

FEDERAL CIRCUIT COURT OF AUSTRALIA

Pham v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2021] FCCA 1775

File number(s): SYG 2169 of 2017

Judgment of: **JUDGE HUMPHREYS**

Date of judgment: 4 August 2021

Catchwords: **MIGRATION** – Administrative Appeals Tribunal – Partner (Provisional) (Class UF) visas – whether the Tribunal failed to lawfully consider the evidence at the hearing of the circumstances under which the visa applicant’s marriage broke down and she came to be in a same sex relationship – legal unreasonableness – whether jurisdictional error is made out – jurisdictional error is made out – the application is upheld

Legislation: *Migration Act 1958* (Cth), ss 5CB(2)
Migration Regulations 1994 (Cth), r 1.09A(3)

Cases cited: *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174
Carrascolao v Minister for Immigration (2017) 252 FCR 352
DVO16 v Minister for Immigration [2021] HCA 12
Fox v Percy (2003) 214 CLR 118
Minister for Home Affairs v Baudromo (2018) 267 FCR 320
Minister for Immigration and Citizenship v SZMDS (2010) 240 CLR 611
Minister for Immigration v SZSRS (2014) 308 ALR 67

Number of paragraphs: 53

Date of last submission/s: 15 July 2021

Date of hearing: 15 July 2021

Place: Parramatta

Counsel for the Applicant: Mr Karp

Counsel for the Respondents: Mr Reilly

ORDERS

SYG 2169 of 2017

BETWEEN: HONG THUY PHAM
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT
SERVICES AND MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE HUMPHREYS

DATE OF ORDER: 4 AUGUST 2021

THE COURT ORDERS THAT:

1. The name of the first respondent be changed to the Minister for Immigration, Citizenship, Migrant Services & Multicultural Affairs.
2. The application is upheld.
3. An order that the decision of the Administrative Appeals Tribunal be quashed.
4. A writ of mandamus directed to the Administrative Appeals Tribunal, requiring them to determine the applicant's application according to law.
5. The first respondent to pay the applicant's costs fixed in the amount of \$7,467.00.

REASONS FOR JUDGMENT

JUDGE HUMPHREYS

INTRODUCTION

- 1 The review applicant Hong Thuy Pham (“Hong”) is an Australian citizen, born in Vietnam. On 10 June 2015, the review applicant sponsored the application of Huong Tu Pham (“Tu”) and her two children for Partner (Provisional) (Class UF) visas’, on the basis that Tu was the same sex partner of the sponsor, Hong.
- 2 On 29 August 2016, a delegate of the Minister for Immigration (“the delegate”) refused to grant the visas’ sought, on the basis that the delegate was not satisfied that the review applicant Hong, was the spouse of the visa applicant, Tu.
- 3 Hong sought merits review at the Administrative Appeals Tribunal (“the Tribunal”). In a decision dated 5 June 2017, the Tribunal affirmed the delegate’s decision not to grant partner visas’ to Tu and her children.
- 4 Hong now seeks judicial review of the Tribunal decision.

THE ADMINISTRATIVE APPEALS TRIBUNAL DECISION

- 5 Given the nature of the decision under review by this Court, and the grounds of judicial review being agitated, it is necessary to set out the Tribunal decision reasons in some detail.
- 6 As at the date of the Tribunal hearing, the review applicant Hong, was 41 years of age, and is an Australian citizen born in Vietnam. The review applicant migrated to Australia as the spouse of an Australian citizen in March 2009. That marriage ended in divorce in 2013.
- 7 The visa applicant, Tu, was born in 1968 and was 49 years of age as at the date of the Tribunal hearing. The visa applicant was previously married in 1997. That marriage ended in divorce in March 2014. Two children were born in 1998 and 2003. Those children were included in the application.
- 8 At paragraph 10 of its decision, the Tribunal noted that Hong claimed that she had always felt she was more male than female. Hong entered in to a heterosexual marriage because she felt that was expected. The review applicant Hong, claims to have known the visa applicant, Tu, since 2007. They met again at a New Year’s Eve party in Vietnam in 2014 prior to Hong returning to Australia in February 2014. They claim to have been a same-sex relationship

since April 2014 and they had a party in recognition of the relationship in January 2015. The review applicant, and the visa applicant claim to have resided together at the visa applicant's address in Ho Chi Min City in December 2014 and July 2015. They resided at a hotel together in April 2014 and January 2015 prior to lodging the visa application in June 2015.

9 At paragraph 11 of its decision, the Tribunal noted that there was evidence before it that Hong had travelled outside Australia on a regular basis for approximately one month in early 2011, 2012, twice in 2014 and twice in 2015. Evidence in the form of documents was provided to the Tribunal including bank statements, parcel wrappings indicating that the sender was Hong, photographs of the parties together and with others including Tu and her children, hotel receipts for stay in March 2007 to copies of money transfers from Hong to Tu totalling \$3020 in 2016 – 2017, a Vodafone bill in Hong's name from January 2016 to March 2017 together with the other documents including copies of some email and text traffic in Vietnamese from 2014 to 2017.

10 At paragraph 16 of its decision, the Tribunal noted that in order for the visa to be granted, the Tribunal needed to be satisfied that the parties were in a de facto relationship being one where the parties have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couples live together or do not live separately and apart on a permanent basis and the couples are not related by family: (see; s 5CB(2) of the *Migration Act 1958* (Cth) ("the *Act*"). In forming an opinion as to whether they are in a de facto relationship, the Tribunal is required to give consideration to all circumstances of the relationship, including the financial and social aspects of the relationship, the nature of the visa applicants and review applicant's household and their commitment to each other as set out in r 1.09A(3) of the *Migration Regulations 1994* (Cth) ("the *Regulations*").

11 At paragraph 18 of its decision, the Tribunal stated that it found the parties evidence to be rehearsed and lacking in relevant detail insight authenticity. The Tribunal determined not to accept the parties' claims. At paragraph 20 of its decision, the Tribunal noted that the parties had basic knowledge of each other's current incomes and past history including savings, bank accounts and the fact that neither had any assets. At paragraph 20 of its decision, the Tribunal seemed concerned as to why the review applicant had sought a fee reduction of the Tribunal's application fee when she had \$11,000 in the bank and a full-time job.

- 12 At paragraph 21 of its decision, the Tribunal concluded that neither party had given much detail to consideration of how they would manage financially if the visa applicant came to Australia with her two teenage children. The visa applicant claimed she would rent a two-bedroom place for around \$300 per week and use savings to fund the household until the visa applicant began to work part-time on the weekends as a kitchen hand. The visa applicant was not able to tell the Tribunal anything meaningful about the cost of living in Australia and was not aware that there would be significant costs associated with sending her eldest child to university.
- 13 At paragraph 22 of its decision, the Tribunal put to the review applicant that the proposed accommodation arrangements would entail two teenagers, then aged 18 and 15 years of the opposite sex sharing the same room. The Tribunal asked if the children had been consulted about these arrangements and the review applicant claimed they all knew that they would be struggling financially at the beginning.
- 14 At paragraph 23 of its decision, the Tribunal noted that the parties' had no major assets or liabilities in common. The Tribunal accepted that the review applicant had sent the visa applicant money totalling some \$5000 over the past years but noted it was not at all clear why. The review applicant claimed that the visa applicant uses the money for general living expenses, yet the visa applicant seems to manage to run her household and raise children on income she had generated herself for many years.
- 15 At paragraph 24 of its decision, the Tribunal noted that the parties' claimed to have used \$4500 that was in the joint Hong Kong and Shanghai Banking Corporation Limited ("HSBC") account for tuition fees and unexpected future expenses but provided no evidence of this. The Tribunal did not have a bank statement showing how much money was withdrawn when, nor anything showing that the account had been closed. The Tribunal did not have receipts for tuition fees. The visa applicant claimed not to have a bank account, so there was no evidence before the Tribunal of how much income she generates and spends on what. The Tribunal was not satisfied that the funds of the joint account were used to support the relationship of the children of that relationship.
- 16 At paragraph 26 of its decision, the Tribunal noted that it not been provided with a CBA bank statement showing the salary of the visa applicant being paid in or other expenses to show what additional financial support she provided the visa applicant or in what way, or to support her claim that she saved \$11,000 since she began working. The Tribunal was not satisfied as

to how the visa applicant had managed to save a large sum of money in a short period of time from the commencement of her work in 2016.

17 The Tribunal was concerned at paragraph 20 of its decision, that the financial aspects of the parties' relationship did not take into account the financial costs of living in Australia or the cost of educating two teenagers. The Tribunal did not accept that the parties proposed living arrangements of sharing a two-bedroom apartment with themselves and two teenage children is one that had been thought through and in the Tribunal's mind, did not support a finding that they intended to live together as a blended family.

18 At paragraph 28 of its decision, the Tribunal noted that the parties had spent very little time together in each other's company. They had at most spent four months together over three years since they claim to have met. The Tribunal noted that the parties were unable to give any insights in their day-to-day lives while they had been together. The information provided, was very basic and went to the children going to school, doing some shopping and assisting the children to study. The Tribunal was of the view that a couple, had they a genuine shared living experience, would be able to provide more detailed and nuanced information than that provided. The Tribunal was concerned that the review applicant did not demonstrate that she had conversed with the children in any meaningful way about their lives, hopes or aspirations. The Tribunal concluded that the evidence provided by the parties, did not support a finding that they had lived, or intended to live a shared life in a shared household.

19 At paragraph 33 of its decision, the Tribunal found that it was not satisfied with the evidence provided by the parties about their social aspects of the relationship to support a finding that they are in a genuine ongoing and exclusive spousal relationship or that they are recognized as spouses by others.

20 At paragraph 35 of its decision, the Tribunal found that the parties' account of the inception development of the relationship lacked relevant detail, insights, spontaneity and authenticity. The words used to describe how they both discovered that they were lesbians and entered into a same sex relationship, were flat and lacked meaning. The Tribunal noted that the visa applicant, Hong, was in a heterosexual marriage for 17 years and did not question her own sexuality during that time. The parties claimed their transition into a same sex relationship was smooth and trouble-free and that their families embraced the new relationship without any demonstration of confusion or conflict. The applicants' stated that their families were

supportive and did not question it. The Tribunal found this explanation overly simplistic and lacking in credibility. The Tribunal did not accept that a transition from a heterosexual relationship of some 17 years standing which resulted in two children, to a same sex relationship within three months of meeting, could have been trouble-free smooth and uneventful either for the parties themselves or their families if indeed it was a genuine spousal relationship. The Tribunal concluded that, such an explanation was easy to manufacture and repeat under questioning and did not require the parties involved to demonstrate insight at all into what such a relationship would actually entail for the parties involved or for their families.

21 At paragraph 37 of its decision, the Tribunal noted that the visa applicant gave evidence that she had lost trust in men after her marriage and that her husband did not respect her. In the Tribunal minds', these were not insights into how someone discovers that they are a lesbian after 17 years of marriage, two children and no questions about the heterosexuality. The Tribunal found that they were not even real insights into how the visa applicant's marriage broke down. To the Tribunal mind, they most certainly did not support the parties' claims that they had entered into a genuine spousal relationship.

22 At paragraph 38 of its decision, the Tribunal noted its concerns of the parties' demonstrated little consideration of the children's needs or desires. The Tribunal stated that they did not appear to have consulted with them in any meaningful way about what life in Australia might mean. Neither party had made any inquiries of universities and schools as to what courses they might attend and they did not inquire about the cost of further education. Such a lack of consideration for the needs of the visa applicant's children, the Tribunal concluded, did not support a claim that the parties will be living together as spouses with the children as a family unit

GROUND OF JUDICIAL REVIEW

23 The grounds of judicial review are contained in an Amended Application filed with the Court on 23 June 2021. As no objection is taken by the first respondent, leave was granted to rely upon these amended grounds. They are as follows:

Ground One

The Tribunal erred by failing to lawfully consider evidence given at hearing as to the circumstances in which the visa applicant's marriage broke down and how she came to be in a same-sex relationship.

Ground Two

The Tribunal's decision was affected by legal unreasonableness.

Particulars.

1.1 In view of the fact that the tribunal was taking evidence through an interpreter, and in the case of the primary visa applicant through an interpreter over the phone from a foreign country, it could not reasonably find that the parties evidence was rehearsed (at decision [18]).

1.2 In view of the fact that the tribunal was taking evidence through an interpreter, and in the case of the primary visa applicant through an interpreter over the phone from a foreign country it court not reasonably find that:

“The parties account (sic) of the inception and development of the relationship lacks relevant detail, insights, spontaneity authenticity. The words they used to describe how they both discovered that they were lesbians and entered into a same-sex relationship were flat and lacked meaning” (at decision [35]).

1.3 The Tribunal took factually a relevant matters into account:

1.1.1 The finding that the parties did not adequately consider the costs of living in Australia and educating the visa applicants to teenage children (at decision [21], [26]).

1.1.2 The parties demonstrated little consideration of the needs and desires of the visa applicant's children (at decision [38]).

THE APPLICANT'S SUBMISSIONS

24 In relation to ground one, it was submitted that Tu gave evidence at transcript 27-29 that after her marriage, she developed a feeling that she was scared of men, could not trust men, and that she found emotional support and sympathy from Hong.

25 At transcript 29, Tu was asked a question as to how the sexual relationship came about. Tu stated that after suffering a marriage with an uncaring husband she had no feelings at all for a person of the opposite sex and then stated: “*We empathised with each other, we share with each other for everything and we care for the children and that's why it happened*”.

26 Whilst Tu gave evidence at the hearing, the Tribunal in its summary at paragraphs 35-37 of its decision, made no mention of Tu's evidence, including that she found emotional support from Hong and that it was after “*lots of phone calls*” she developed empathy for people who love people of the same sex.

27 The matters encompassed in Tu's explanation as to how and why she entered into a same-sex relationship was central to it. Yet the Tribunal made no mention of this evidence. Reliance

was placed on *Minister for Immigration v SZSRs* (2014) 308 ALR 67 at [34]. In that decision, it was held that where a particular matter or evidence is not referred to in the reasons this may be used as a basis for inferring that the matter or evidence was not considered at all. Given the centrality of the issue in relation to how the same-sex relationship came about, it was submitted that the Court should find that it was not considered. In not considering the matter, the Tribunal did not engage in an “*active intellectual process*”: (see; *Carrascolao v Minister for Immigration* (2017) 252 FCR 352 at [46]).

28 In relation to ground two, Courts have at various times expressed caution about the use of demeanour (*Fox v Percy* (2003) 214 CLR 118 at [30]-[31]) and evidence taken through Interpreters, in assessing the credibility. In *DVO16 v Minister for Immigration* [2021] HCA 12 at [54] Edleman J stated:

[54] The errors that can arise from interpretation are not limited to the consequences of incorrect interpretation. They extend also to the pernicious effect of adverse credibility assessments based upon matters of demeanour and impression. A former member of the Refugee Review Tribunal has correctly described how “[t]he utilisation of demeanour, without more, to substantiate adverse credibility findings is ‘fraught with dangers’”. Empirical studies have also suggested that the medium of an interpreter can affect assessment of demeanour, and therefore credibility, “by the interpreter’s voice, dress, mannerisms, linguistic competence, age, race and gender”. As Professor Groves has observed, decision-makers “may struggle to distinguish between the words and demeanour of an interpreter and those of the person being interpreted”. Further, the unspoken relationship between the interviewee and the interpreter, especially if there is not complete trust between them, can sometimes present a distorted impression of, or distorted context for, the interpreted words. These problems for credibility assessments based, in part, upon impression and demeanour are compounded by cultural issues that may not be known to the decision-maker such as the impoliteness in some cultures of direct responses to questions or the extreme discomfort involved in discussion of some topics in particular cultures. All of these considerations compound the usual problems of assessment of demeanour, particularly in the context of evidence in an atmosphere that is very commonly one of high pressure and which also can commonly concern highly distressing matters. Indeed, in the BNB17 case itself, the Authority observed, of circumstances of sexual assault against those of BNB17’s ethnicity, that there was “ample credible country information that sexual assault has been engaged in by the authorities” in a systematic way.

29 All of these issues arise in the current matter. It was not however, open for the Tribunal to make an impressionistic finding that the parties’ evidence was rehearsed: (see; paragraph 18 of the Tribunal decision) and that their account of the inception and development of the relationship lacks relevant detail, insights, spontaneity authenticity. The Tribunal’s findings in that respect, lacked an evident and intelligible justification, given the evidence was given through an interpreter and in particular through an interpreter via phone.

30 In addition, the Tribunal findings that the parties did not adequately consider the costs of living in Australia and educating the visa applicants' two teenage children: at paragraph 21 and paragraph 26 and that the parties demonstrated little consideration of the needs and desires of the visa applicant's children at paragraph 38 of its decision, were matters that were entirely irrelevant to the matter in issue. This was not a question of whether Tu wanted to come to Australia. She clearly did, by applying for the visa. These findings are legally unreasonable in that they are of no conceivable relevance. Accordingly, the matter is affected by legal unreasonableness.

THE FIRST RESPONDENT'S SUBMISSIONS

- 31 Counsel for the first respondent, provided relatively short written submissions to the Court.
- 32 Ground one complains that the Tribunal failed to consider evidence about how the visa applicant's marriage broke down and how she came to being in a same-sex relationship it was submitted, is not a fair reading of the Tribunal's reasons. The Tribunal did not need to specifically mention every item of evidence or every submission put to it, or provide a "*line by line*" refutation of the visa applicants' claims: (see; *Minister for Home Affairs v Baudromo* (2018) 267 FCR 320 at [48]-[49]). The Tribunal summary of the visa applicant's evidence at paragraphs 35-37 of its decision, indicated that it was aware of and considered her evidence concerning the breakdown of a marriage and entry into a same-sex relationship with the applicant but did not accept this evidence. This indicates a consideration of the evidence, albeit, not in the applicant's favour.
- 33 Ground two claims that the Tribunal's decision is legally unreasonable. The first and second particulars, assert that the Tribunal could not find as it did at paragraph 18 and 35 of its decision that the parties evidence appeared rehearsed and lacked relevant detail, insight, spontaneity and authenticity because the evidence was given through an Interpreter and, in the case of the visa applicant, by phone. While the difficulties in making credit findings in such circumstances can be acknowledged, there is no rule that such findings cannot be made when evidence is given through an Interpreter. The applicants' submissions do not explain why reasonable minds could not differ about the Tribunal's conclusions, so legal reason has not been established: (see; *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [130]-[131]).
- 34 The third particular claims that the matters the Tribunal took into account at paragraphs 21, 26 and 38 of its decision, were "*factually irrelevant*" matters concerning the needs of the visa

applicant's children if they came to Australia. As the Tribunal explains at paragraphs 26 and 38 of its decision, this evidence is relevant as to whether the parties will be able to live together as a family unit with children in Australia as is claimed. Ultimately therefore, it goes to the credibility of their claim to be in fact spouses. As reasonable minds could differ about this reasoning, it again is not legally unreasonable.

CONSIDERATION

- 35 It is important to note that the visa being sought in this case, was a Partner (Provisional) (Class UF) visa. Such a visa is temporary in nature and allows the visa applicant the right to reside in Australia. Subsequently, the visa applicant must show that they meet the criteria of a genuine and continuing relationship, for a permanent partner visa to be granted.
- 36 The visa applicant Tu does not hold the right to reside in Australia. Thus the relationship she claims with Hong has been a long distance one, with each maintaining a separate household in Australia and Vietnam, with limited periods in between when they have been together.
- 37 Matters involving the consideration of whether a couple are in a de facto relationship for the purposes of s 5CB of the *Act*, are inherently difficult to determine. While the *Act* provides that certain matters need to be considered, in order to determine whether a person is the de facto partner of another, the nature of human relationships is infinitely varied and complex. For example, there are many marriages where for one reason or another, sexual relations may not occur and may not have occurred for some years, yet the parties are and are seen to be genuinely committed to each other in a relationship. While the *Act* defines a relationship as being to the exclusion of all others, infidelity can and does occur. The concept of an open relationship is not recognised by the *Act*. The fact that many relationships can and do survive infidelity again, is not a concept recognised by the *Act*.
- 38 Accordingly great care needs to be taken when evaluating evidence and the claims of applicants' to evaluate them against the statutory criteria, as set out in s 5CB of the *Act*, but with an eye to reality that relationships that are genuine and continuing, can and do take many different forms.
- 39 Both the Tu and Hong are Vietnamese. The Tribunal member's task was to undertake a consideration of the evidence with reference to the statutory criteria. That task was made very much more difficult in that evidence needed to be given remotely, via telephone, through an

Interpreter in the case of Tu. Hong's evidence was given orally at the Tribunal, but again with the aid of an Interpreter.

40 The Tribunal at paragraph 35 of its decision, found difficulty in accepting that two mature women might be able to transition from previous unhappy heterosexual relationships to a same sex relationship that was smooth, trouble free and that their families embraced the new relationship without confusion or conflict. The Tribunal found their account of the inception of the relationship "lacked relevant detail, insights, spontaneity or authenticity".

41 At paragraph 36 of its decision, the Tribunal found that the applicants' explanations were overly simplistic and lacking credibility. The Tribunal found the explanations offered by the applicants' as easy to manufacture and repeat under questioning.

42 The Tribunal did not appear to consider the alternative possibility that people can and do end heterosexual relationships after many years and then enter into same sex relationships. The relevance of the reasons for the breakdown of Tu's marriage, seem to the Court to be irrelevant to the matter that was under consideration, being the nature of the claimed relationship with Hong. That said, Tu claimed to have gone from a longstanding and very unhappy relationship to one where she had a partner that empathised, cared for and loved her and who wanted to be with her.

43 The Tribunal had difficulty accepting a transition from a previous heterosexual marriage to a same sex relationship could be relatively trouble free. The basis for this conclusion is not readily apparent. There was no evidence cited by the Tribunal as to the acceptance or otherwise of same sex couples in Vietnamese culture. No country or other information was referred to. The only evidence was oral evidence given by Hong by that there is societal discrimination in Vietnam against same sex couples, but their respective families embraced the new relationship.

44 At paragraph 37 of its decision, the Tribunal found that the statement by the visa applicant that she lost trust in men and her husband did not respect her, was not an insight into how someone might discover they are lesbian after 17 years of marriage, two children and no questions about their heterosexuality, troubling. It was commented that it did not even reveal any insights into how the visa applicant's marriage broke down.

45 Equally troubling, was the Tribunal's comments as to the parties demonstrating little consideration as to the children's needs or desires. The Tribunal expressed concern that two

sibling teenagers, a boy then aged 18 and a girl then aged 14 might have to share a bedroom. The comment was made without any apparent evidence as to the current sleeping arrangements in Vietnam for the children. It perhaps displays an attitude which reflects Australia societal norms rather than the norms in Vietnam. It was made without direct evidence from the children themselves. Counsel for the applicant stated that the question and answer at page 6 of the transcript that stated the siblings “were living together” was in fact a reference to the fact the siblings currently shared a room to sleep in in Vietnam. Thus the willingness to share a room in Australia would not cause them issues.

46 Reference was also made to the fact that neither party had made inquiries as to education opportunities for the children should they be able to come to Australia or the cost of further education. The Tribunal found this to be a matter that did not support the claim that the parties would be living together. With respect to the Tribunal member, given the fact that the spouse visa had been refused, and was subject to review before the Tribunal, it is hardly surprising that the parties may have not engaged in detailed planning as to all aspects of their joint life together until such a time as they were sure that Tu would be able to move to Australia.

47 Ground one is pleaded on the basis the Tribunal failed to lawfully consider the evidence at the hearing of the circumstances under which the Tu’s marriage broke down and she came to be in a same sex relationship.

48 Ground two is pleaded on the basis of legal unreasonableness in terms of the credibility findings in relation to Tu’s evidence. Alternatively the Tribunal took irrelevant matters into account, as they related to the needs or desires or the costs of the children accompanying Tu to Australia.

49 Legal unreasonableness may extend to credit findings. A credit finding will be sound, if it was “*open to the Tribunal on the material, was based on rational grounds and was arrived at on consideration of matters that were logically probative of the issue of credibility*”: (see; *ARG15 v Minister for Immigration and Border Protection* [2016] FCAFC 174 at [83]).

50 Counsel for the applicant correctly pointed out that great care needs to be taken about adverse credit findings, including demeanour, where evidence is taken through an Interpreter. Counsel for the applicant relied upon *Fox v Percy* (2003) HCA 22 at [31]-[32]. The Courts attention

was also taken to *DVO16* at [4]-[6] per Keifel CJ, Gageler, Gordon and Steward JJ and in particular Edelman J at [54] where he said:

[54] The errors that can arise from interpretation are not limited to the consequences of incorrect interpretation. They extend also to the pernicious effect of adverse credibility assessments based upon matters of demeanour and impression.

51 In this case the Tribunal made serious and significant adverse credibility findings based on the interpreted oral evidence of Tu which was given via telephone. At no point did the Tribunal member caution herself or as to the difficulties of making adverse credit findings in circumstances where Hong gave evidence through an Interpreter and Tu gave evidence via telephone and through an Interpreter. There does not appear at any point, to be a consideration that the evidence given, may in fact be true and was not of the depth and detail that the Tribunal would have preferred due to the inherent limitations of both telephone evidence and interpretation. The Tribunal does not appear to have given consideration to any possible cultural issues related to a mature, possibly unsophisticated, Vietnamese woman having to explain in great detail to a Tribunal in stressful circumstances the unhappiness she experienced in her marriage, subsequent divorce and the finding herself in a same sex relationship.

52 The Court is satisfied that the credit findings of the Tribunal are infected with jurisdictional error. They are not legally reasonable. Grounds two (1.1) and (1.2) of the application are upheld. It is thus not necessary to deal with ground one or Ground two (1.3).

CONCLUSION

53 Accordingly, the application is upheld.

I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Humphreys.

Associate:

Dated: 4 August 2021